(28,829)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 874.

ELMORE D. DIER, HARRY J. LAWRENCE, JR., AND LAWRENCE STARR, &c., ET AL., APPELLANTS,

vs.

JOAB H. BANTON, DISTRICT ATTORNEY OF THE COUNTY OF NEW YORK, AND MANDRED W. EHRICH, TRUSTEE IN BANKRUPTCY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 15, 1922.

1 *Order Appointing Receiver.*

At a Stated Term of the District Court of the United States for the Southern District of New York Held at the Court House Thereof, in the Post Office Building, in the Borough of Manhattan, City of New York, on the 16th Day of January, 1922.

Present: Hon. Julian W. Mack, Circuit Judge.

In the Matter of ELMORE D. DIER, HARRY J. LAWRENCE, JR., and LAWRENCE STARR, Individually and as Co-partners, Doing Business under the Firm Name of E. D. Dier & Co., and E. D. DIER & Co., Alleged Bankrupts.

On reading and filing the annexed petition of Samuel C. Rudman, Ruben Lilienfeld and Charles C. Hansen, duly verified the 14th day of January, 1922, and on all the proceedings heretofore had herein,

Now, upon motion of Hays & Wadhams, attorneys for the petitioners, it is hereby

Ordered that Manfred Ehrick, of New York City, in said district be and he hereby is appointed Receiver of the estate of the said alleged bankrupts on filing a bond as Receiver in the sum of $25,000 with sufficient sureties to be approved by this Court; that thereupon said Receiver take charge of and hold such estate until further

2 notice; and it is further

Ordered that all persons, firms or corporations and all creditors of said alleged bankrupts, and all attorneys, agents, officers and servants of said alleged bankrupts, forthwith deliver to said Receiver all property, assays, and effects of whatsoever nature, and wheresoever located, including merchandise accounts, notes, bills receivable, drafts, checks and moneys and other choses in action, account books, records, chattels, lands and buildings in the possession of or owned by said alleged bankrupts; that said alleged bankrupts are ordered forthwith to deliver to said Receiver all and any of such property now in the possession of said alleged bankrupt; and it is further

Ordered that all persons, firms or corporation, including all creditors of said alleged bankrupt, and the representatives, agents, attorneys, servants of such creditors, and all Sheriffs, Marshals, or other officers, or their deputies, representatives or servants, be and they hereby are jointly and severally enjoined, restrained and stayed from removing, transferring, disposing of or attempting in any way to remove, transfer or dispose of or in any way interfere with the property of said alleged bankrupts or owned or controlled by said alleged bankrupts and in the possession of any officer, agent, attorney or representative of said alleged bankrupts, and all such persons are further enjoined, stayed and restrained from executing or issuing, or causing the execution or issuance or the suing out from any Court

of any process, summons, attachment, replevin, execution
3 or other proceeding for the purpose of impounding or taking possession of or interfering with any property owned by or in possession of said alleged bankrupts, and each and all of said persons, firms or corporations having process against the said alleged bankrupts are hereby severally enjoined from taking any steps or proceedings or doing any act or thing in any action where said alleged bankrupts may be either plaintiff or defendant, and from causing, procuring, suffering or permitting it to be done.

(Signed) JULIAN W. MACK,
U. S. Circuit Judge.

U. S. District Court S. D. of N. Y. Filed Jan. 16, 1922.

Bond of National Surety Company in the sum of $25,000 approved by Julian W. Mack, Circuit Judge, filed Jan. 16, 1922.

4 *Order to Show Cause.*

At a Term of the District Court of the United States for the Southern District of New York Held at the Court House Thereof, in the Post Office Building, in the Borough of Manhattan, City of New York, on the 16th Day of February, 1922.

Present: Hon. Learned Hand, District Judge.

31368.

In the Matter of ELMORE D. DIER, HARRY J. LAWRENCE, JR., and LAWRENCE STARR, Individually and as Co-partners, Doing Business under the Firm Name of E. D. Dier & Co., and E. D. DIER & Co., Alleged Bankrupts.

Upon the petition of Elmore D. Dier, verified the 16th day of February, 1922, and upon the petition in bankruptcy and the subpœna herein, and upon all the papers and proceedings in this matter,—

Now, upon motion of Rockwood & Lark, Solicitors for the said Elmore D. Dier and E. D. Dier & Co., it is

Ordered that Hon. Joab B. Banton, District Attorney for New York County, and Manfred W. Ehrich, as the Receiver of the goods, chattels, properties and effects of Elmore D. Dier and E. D. Dier & Co., show cause before the United States District Court for the Southern District of New York, in Room 235, Post Office
5 Building in said City, at the opening of the court at ten o'clock A. M., on Monday, February 20th, 1922, or as soon thereafter as counsel can be heard, why an order should not be made enjoining and restraining the said Receiver from turning over to the said Joab W. Banton, District Attorney of the County of New York, the books, records, documents and papers of Elmore D. Dier and E. D. Dier & Co., upon the ground that said delivery of such papers to the

said District Attorney will be violative of the constitutional protection accorded said alleged bankrupts, as prayed for in the petition of the said Elmore D. Dier and why the said Elmore D. Dier and E. D. Dier & Co., should not have such other and further relief in the premises as may be just, and sufficient reason appearing therefor, it is further

Ordered that until the argument and determination of said motion, said Receiver be and he is hereby directed to retain in his possession the books, records, documents and papers of the said Elmore D. Dier and E. D. Dier & Co., and not to part therewith until the further order and direction of the Court in the premises.

And sufficient reason appearing for prescribing an order to show cause herein, it is further

Ordered that service of a copy of this order and petition upon which it is granted upon said District Attorney and said Receiver on or before the 17th day of February, 1922, shall be due and sufficient service.

LEARNED HAND.

6 *Petition.*

District Court of the United States for the Southern District of New York.

No. 31368.

In the Matter of ELMORE D. DIER, HARRY J. LAWRENCE, JR., and LAWRENCE STARR, Individually and as Co-partners, Doing Business under the Firm Name of E. D. Dier & Co., and E. D. DIER & Co., Alleged Bankrupts.

The petition of Elmore D. Dier respectfully shows:

That heretofore and on the 14th day of January, 1922, a petition in involuntary bankruptcy was filed against your petitioner in the proceeding above-entitled, seeking an adjudication in bankruptcy of your petitioner, both individually and as a member of the firm of E. D. Dier & Co.; that the subpœna in said proceeding has been served upon your petitioner, but no answer has yet been filed and said matter is now pending undetermined in the United States District Court for the Southern District of New York; that subsequent to the filing of the said petition, Manfred W. Ehrich, Esq., of 60 Wall Street, New York, was duly appointed receiver of the assets, properties and effects of your petitioner, and of the firm of E. D. Dier & Co., and said Receiver has taken possession of said

7 properties, and among other things has possession of the books, records, documents and papers of said firm of E. D. Dier & Co.

Said firm of E. D. Dier & Co. was engaged in the brokerage business at No. 42 New Street, Borough of Manhattan, City of New York, and has numerous branch offices in several cities throughout the United States. Ancillary Receivers have been appointed in Chicago,

Philadelphia and Pittsburgh, who, upon information and belief, have also taken possession of certain assets and properties of the alleged bankrupt estate.

Your petitioner has been informed by the said Receiver, above named, that the District Attorney of the County of New York, has applied to the said Receiver requesting him to deliver possession to said District Attorney of the said books, records and papers of your petitioner and said firm of E. D. Dier & Co., to the end that the same may be used by the said District Attorney before the Grand Jury of the County of New York in criminal proceedings, wherein the said District Attorney seeks the indictment of your petitioner as having committed an alleged criminal offense.

Your petitioner is advised and verily believes that the delivery of said books, records and papers to the said District Attorney by the said Receiver would be in plain violation of the protection accorded to your petitioner and to the said firm of E. D. Dier & Co., by the Fourth and Fifth amendments to the Constitution of the United States, as they have been interpreted and applied
8 by the Supreme Court of the United States in
Boyd v. U. S., 116 U. S. 616;
Weeks v. U. S., 232 U. S. 383;
Silverthorne Lumber Co. v. U. S., 251 U. S. 385;
Amos v. U. S., 255 U. S. 313;
(See temporary Advance Sheets issued April 20th, 1921.)

Also

Flagg v. U. S., 233 Fed. 481,

and also indirectly in the decision of the United States Supreme Court in Arnstein v. McCarthy, 254 U. S. 71, in that if said books, records and papers are to be used and considered by said Grand Jury as evidence against your petitioner it, in effect, constitutes your petitioner as a witness against himself, which is violative of the constitutional privileges and immunities accorded to your petitioner, as above set forth.

Your petitioner is advised by said Receiver, and verily believes that said Grand Jury is now in session and that the said District Attorney has asked that said books be immediately delivered to him by said Receiver for use before said Grand Jury, as aforesaid, for which reason an order to show cause is desired directing the said Receiver to show cause before this Honorable Court why he should not be enjoined and restrained from delivering over said books, records and papers of your petitioner and the said firm of E. D. Dier & Co., to said District Attorney and said Grand Jury, and why any subpœna issued to the said Receiver or his representatives, should not be vacated.

No previous or other application has been made for the
9 order asked herein, and because of the urgency of the situation, as above set forth, there is no time to give a notice of motion.

Wherefore your petitioner prays for the order to show cause, as aforesaid.

Dated, February 16th, 1922. ELMORE D. DIER.

10 CITY AND COUNTY OF NEW YORK, *ss:*

Elmore D. Dier, being duly sworn, deposes and says that he is the petitioner named in the foregoing petition; that he has read the same and knows the contents thereof and that the same is true of his own knowledge except as to the allegations therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true. ELMORE D. DIER.

Sworn and subscribed to before me this 16th day of February, 1922.

CHARLOTTE EPSTEIN,
Notary Public New York County.

(Affidavits of service attached.)

U. S. District Court, S. D. of N. Y. Filed Feb. 27, 1922.

11 United States District Court, Southern District of New York.

No. 31368.

In the Matter of E. D. DIER & Co., Ex Parte ELMORE D. DIER.

Opinion of Hon. Learned Hand, District Judge, on Dismissal of Rule.

This proceeding comes up on rule nisi to enjoin a receiver in bankruptcy and the District Attorney of New York County from using the books and papers of the alleged bankrupt firm before the Grand Jury of the Supreme Court of New York. A petition was filed against the firm of which the petitioner was a member, and a receiver appointed. The alleged bankrupts without objection surrendered possession of the books to the receiver, who now holds them. The District Attorney of New York County, contemplating criminal prosecution of the petitioner, has demanded possession of the books for presentation to a Grand Jury. The petitioner asserts that such surrender would violate his constitutional privileges under Articles 4 and 5 of the U. S. Constitution.

Nash Rockwood, for the rule.
Joab W. Banton, District Attorney, opposed.

LEARNED HAND, *D. J.:*

12 It may be accepted that Judge Holt's ruling in In re Harris, 164 Fed. Rep. 293, had the approval of the Supreme Court in the appeal in that case, In re Harris, 221 U. S. 274.

There the alleged bankrupt resisted the surrender of his books to the receiver and was eventually protected to the extent that though he must surrender, it was on condition that the books should not be used by the receiver in aid of any criminal prosecution against him. Thus a compromise was effected between the right of his creditors to administer his assets, and his own right not to produce evidence against himself.

In Johnson v. U. S., 228 U. S. 457, the bankrupt had without reservation surrendered his books to a trustee and these were thereafter used against him in a criminal trial over his objection. The point involving his constitutional privilege went to the Supreme Court and was ruled against him. The theory of the case was that once possession and title passed protest from the bankrupt his privilege ended. "A party is privileged from producing the evidence, but not from its production:" (p. 458). In the case at bar there is indeed no trustee, only a receiver, and a receiver has no title, but that, I conceive, makes no difference. The production depends as little upon compelling the incriminated person to produce evidence against himself, when the possessor has no title as when he has. The possessor alone can produce, not the owner, and the privilege protects only against such compulsion. See also In re Tracy, 177 Fed. Rep. 532, and In re Mandel, 224 Fed. Rep. 642. The test I take is whether the surrender was resisted when the receiver demanded possession.

13 Cases like Boyd v. U. S., 116 U. S. 616, Weeks v. U. S., 232 U. S. 383, and Silverthorne Lumber Co. v. U. S., 251 U. S. 385, are not in point. In each the possessor of the evidence was forced to produce by illegal means, and this was held to taint, as it were, the evidence, so that not even information might be used, which was derived, during the unlawful possession. Gouled v. U. S., 255 U. S. 298, extended the rule to evidence procured by fraud. None of them touches the competency of proof which has been surrendered without claim of privilege made at the time when the privilege could have been effectively asserted.

Nor is Arndstein v. McCarthy, 254 U. S. 71, nearer. That case decided that the declarations contained in schedules did not open the door to examination generally of the bankrupt's assets. It would apply only in case the alleged bankrupts here were examined upon the transactions contained in the books and papers. No one suggested that the schedules themselves were privileged in favor of the bankrupts. Had that been the ruling, as for example it was before the repeal of R. S. Sec. 860, Johnson v. United States, 163 Fed. Rep. 30, something might be said in the case at bar for the privilege, not under the Constitution, it is true, but under the statute. Nothing of the sort now stands in the way, certainly not Arndstein v. McCarthy, supra.

Rule discharged.

L. H., *D. J.*

February 27, 1922.
U. S. District Court, S. D. of N. Y. Filed Feb. 27, 1922.

14 *Order Approving Trustee's Bond.*

At a Court of Bankruptcy Held in and for the Southern District of New York, in the City, County, and State of New York, on the 20th Day of March, 1922.

Before Seaman Miller, Referee in Bankruptcy in the District Court of the United States for the Southern District of New York.

In Bankrupcy.

No. 31368.

In the Matter of ELMORE D. DIER, LAWRENCE STARR, and HARRY J. LAWRENCE, JR., Copartners, Doing Business under the Firm Name and Style of E. D. Dier & Company, Bankrupt.

It appearing to the court that Manfred W. Ehrich, of the City, County and State of New York, and said District, has been appointed trustee of the estate of the above-named bankrupt, and has given bond with sureties for the faithful performance of his official duties in the amount fixed by the creditors, to-wit, the sum of One Hundred Thousand Dollars.

It is ordered that the said bond be and the same is hereby approved.

SEAMAN MILLER,
Referee in Bankruptcy.

15 *Affidavit of Nash Rockwood.*

District Court of the United States for the Southern District of New York.

No. 31368.

In the Matter of ELMORE D. DIER, HARRY J. LAWRENCE, JR., and LAWRENCE STARR, Individually and as Co-partners, Doing Business under the Firm Name of E. D. Dier & Co., and E. D. DIER & Co., Alleged Bankrupts.

STATE OF NEW YORK,
City and County of New York, ss:

Nash Rockwood, being duly sworn says that he is of counsel for E. D. Dier and E. D. Dier & Co., above-named; that Manfred W. Ehrich, who was Receiver herein when this proceeding was initiated, has since that time been elected trustee of the bankrupts at a meeting of the creditors, and has qualified as such trustee, and is now acting as such.

NASH ROCKWOOD.

Subscribed and sworn to before me this 10th day of April, 1922.
LEARNED HAND,
U. S. District Judge, Southern District of New York.

16 *Order.*

District Court of the United States for the Southern District of New York.

No. 31368.

In the Matter of ELMORE D. DIER, HARRY J. LAWRENCE, JR., and LAWRENCE STARR, Individually and as Co-partners, Doing Business under the Firm Name of E. D. Dier & Co., and E. D. DIER & Co., Alleged Bankrupts.

Upon the affidavit of Nash Rockwood, verified April 10th, 1922, and it appearing that Manfred W. Ehrich, heretofore appointed Receiver of the alleged bankrupts when this proceeding was initiated has since that time been elected trustee of said parties who have been adjudicated bankrupts, and that the said Manfred W. Ehrich has qualified as such trustee and is now acting as such, and,

On motion of Nash Rockwood, Attorney for E. D. Dier and E. D. Dier & Co., it is

Ordered that Manfred W. Ehrich, as Trustee of Elmore D. Dier, Harry J. Lawrence, Jr., and Lawrence Starr, individually and as co-partners doing business under the firm name of E. D. Dier & Co., and E. D. Dier & Co., be, and he is hereby, substituted as a party herein in the place of Manfred W. Ehrich, Receiver, &c., of said alleged bankrupts, and that the papers and proceedings herein be amended accordingly.

LEARNED HAND, *D. J.*

Dated, April 10th, 1922.

U. S. District Court, S. D. of N. Y. Filed Apr. 12, 1922.

17 District Court of the United States for the Southern District of New York.

No. 31368.

In the Matter of ELMORE D. DIER, HARRY J. LAWRENCE, JR., and LAWRENCE STARR, Individually and as Co-partners, Doing Business under the Firm Name of E. D. Dier & Co., and E. D. DIER & Co., Alleged Bankrupts.

Order Discharging Rule.

The alleged bankrupts above-named having presented a petition to the Court for an order to show cause requiring the District Attorney of the County of New York and Manfred W. Ehrich, Receiver of the

alleged Bankrupts above-named, to show cause why the Receiver should not be restrained from delivering the books, records and documents of said alleged bankrupts to the District Attorney of the County of New York to be used in a criminal proceeding pending against the said alleged bankrupts in New York County, upon the ground that the use of said books, records and documents would violate the Constitutional privileges of said alleged bankrupts under Articles IV and V of the United States Constitution.

Now, upon the petition in involuntary bankruptcy filed herein on the 14th day of January, 1922, and upon the order appointing Manfred W. Ehrich Receiver of the said alleged bankrupts dated the 16th day of January, 1922, and upon the petition of Elmore D. Dier, verified the 16th day of February, 1922, and upon the subpœna issued by said District Attorney of New York County calling for the production of said books and papers before the Grand Jury of New York County, and upon the order to show cause granted herein on the 16th day of February, 1922, and upon all the
18 papers and proceedings herein and in this involuntary bankruptcy proceeding, including said subpœna issued by said District Attorney, and having heard Nash Rockwood, Esq., of Counsel for said alleged bankrupts in support of said motion, and Hon. Joab H. Banton, District Attorney for the County of New York, represented by Robert S. Johnstone, Esq., in opposition to said motion, and due deliveration having been had,

It is ordered that the injunctive and other relief prayed for in said petition and in said order to show cause, be and the same is hereby denied and the application of said Petitioners denied, and the rule discharged and

Further ordered that the Receiver herein and said alleged bankrupts deliver over said books, records and documents of said E. D. Dier and E. D. Dier and Company to the District Attorney of the county of New York for use in said criminal proceeding against said Petitioners, if and when appropriate process for that purpose is duly served.

LEARNED HAND, *D. J.*

No objection to form.
(Sgd.) JOAB H. BANTON,
District Attorney.

R. S. J.

Filed in the U. S. District Court, S. D. of N. Y., Apr. 12, 1922.

19 District Court of the United States for the Southern District of New York.

No. 31368.

In the Matter of ELMORE D. DIER, HARRY J. LAWRENCE, JR., and Lawrence Starr, Individually and as Co-partners, Doing Business under the Firm Name of E. D. Dier & Co., and E. D. Dier & Co., Alleged Bankrupts.

Assignment of Errors.

Now come the alleged bankrupts in the above-entitled matter and file and submit the following assignment of errors, upon which they will rely upon their prosecution of the appeal in the above-entitled matter from the order made herein by this honorable Court, to-wit:

First. The United States District Court for the Southern District of New York erred in refusing to grant the relief prayed for in said petition and in the order to show cause granted thereupon.

Second. The United States District Court for the Southern District of New York erred in denying the application of said alleged bankrupts.

Third. The United States District Court for the Southern District of New York erred in discharging the rule herein.

Fourth. The United States District Court for the Southern District of New York erred in directing the Receiver of said alleged bankrupts and said alleged bankrupts to deliver over the books, records and documents of said E. D. Dier and E. D. Dier & Co., to the District Attorney of the County of New York for use in criminal proceedings against said alleged bankrupts.

20 Fifth. The United States District Court for the Southern District of New York erred in deciding that the delivery of the books, records and documents of said alleged bankrupts to the District Attorney of the County of New York for use in criminal proceeding pending against the said alleged bankrupts in New York County would not violate the constitutional privileges of said alleged bankrupts under Articles IV and V of the United States Constitution.

Sixth. The United States District Court for the Southern District of New York erred in deciding that the alleged bankrupts in any way waived their constitutional privileges under Articles IV and V of the United States Constitution.

Seventh. The United States District Court for the Southern District of New York erred in deciding that the acquirement of possession of the books, records and documents of said alleged bank-

rupts by the Receiver appointed by the Court and under the order of the Court could, in any way be considered or construed, as a waiver by the alleged bankrupts of their constitutional privileges under Articles IV and V of the United States Constitution.

Eighth. The United States District Court for the Southern District of New York erred in not making an order in favor of the said alleged bankrupts, as prayed for in and by their said petition and order to show cause, granted herein, instead of denying their said application and discharging the rule as it did.

Wherefore the Appellants pray that said order be reversed and that the said United States District Court for the Southern District of New York be ordered to enter an order or decree reversing the decision and order of said court in said matter, and to enter
21 an order or decree in accordance with the prayer of the petition of the said alleged bankrupts herein, and in accordance with the relief desired in the order to show cause, hereinbefore granted herein.

E. D. DIER.
E. D. DIER & CO.

ROCKWOOD & LARK,
Solicitors for and of Counsel for said Alleged Bankrupts and Appellants Herein.

Office and Post Office Address, 527 Fifth Avenue, Borough of Manhattan, City, County and State of New York.

Admission of service attached.

Filed in the U. S. District Court for the Southern District of New York April 12th, 1922.

22 District Court of the United States for the Southern District of New York.

No. 31368.

In the Matter of ELMORE D. DIER, HARRY J. LAWRENCE, JR., and Lawrence Starr, Individually and as Co-partners, Doing Business under the Firm Name of E. D. Dier & Co., and E. D. Dier & Co., Alleged Bankrupts.

Petition for Appeal.

To the Honorable Learned Hand,
District Court Judge:

The above named Elmore D. Dier, Harry J. Lawrence, Jr., and Lawrence Starr, individually and as co-partners doing business under

the firm name of E. D. Dier & Co., and E. D. Dier & Co., alleged bankrupts in the above-stated matter, feeling aggrieved by the order made and entered in the above-entitled matter on the — day of April, One thousand, nine hundred and twenty-two, do hereby appeal from the said order and from every part thereof, to the Supreme Court of the United States, for the reasons set forth in the assignment of errors filed herewith, and they pray that their appeal be allowed and that citation be issued, as provided by law, and that a transcript of the record, proceedings and documents upon which said order was based, duly authenticated, be sent to the Supreme Court of the United States, under the rules of said court in such cases made and provided.

23 And your petitioners pray that the proper order allowing said appeal and providing for security from them, be made.

ELMORE D. DIER.
E. D. DIER & CO.

ROCKWOOD & LARK,
Solicitors for said Petitioners.

Office & Post Office Address, 527 Fifth Avenue, Borough of Manhattan, City, County and State of New York.

24 CITY AND COUNTY OF NEW YORK, *ss:*

Elmore D. Dier, being duly sworn, deposes and says that he is the petitioner named in the foregoing petition; that he has read the same and knows the contents thereof and that the same is true of his own knowledge, except as to the allegations therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

ELMORE D. DIER.

Sworn and subscribed to before me this 10th day of April, 1922.
CLARENCE E. SMITH,
Notary Public, Kings County, N. Y.

Clerk's No. 593. Register's No. 3247.
Certificate filed in New York County. Clerk's No. 591. Reg. No. 3513.
Term Expires March 30, 1923.

Admission of service attached.

Filed, U. S. District Court, Southern District of N. Y., Apr. 12, 1922.

25 District Court of the United States for the Southern District of New York.

No. 31368.

In the Matter of ELMORE D. DIER, HARRY J. LAWRENCE, JR., and LAWRENCE STARR, Individually and as Co-partners, Doing Business under the Firm Name of E. D. Dier & Co., and E. D. DIER & Co., Alleged Bankrupts.

Order Allowing Appeal.

On motion of Nash Rockwood, Solicitor and of counsel for the Appellants in the above-stated cause, it is hereby

Ordered that an appeal to the Supreme Court of the United States from the order heretofore filed and entered herein be and the same is hereby allowed, and that a certified transcript of the record, papers, documents and all proceedings herein be forthwith transmitted to said Supreme Court of the United States; and it is

Further ordered that the bond on appeal be fixed at the sum of Two Hundred and Fifty Dollars ($250) as a bond for costs; and it is

Further ordered that for a period of thirty days from date and the further order of this Court in the premises, that all proceedings under the order herein, dated April 10th, 1922, except the appeal therefrom, be stayed, and that Manfred W. Ehrich, Trustee of said bankrupts be and is hereby directed to retain possession of the books, records, documents and papers of the said bankrupts until the further order of this Court.

Dated, April 10th, 1922.

LEARNED HAND, *D. J.*

Filed U. S. District Court, S. D. of N. Y., April 12th, 1922.

26 (*Bond.*)

Bond of the National Surety Company in the sum of $250 filed April 12, 1922, approved by Learned Hand, United States District Judge.

27 United States District Court, Southern District of New York.

31368.

In the Matter of ELMORE D. DIER, HARRY J. LAWRENCE, JR., and LAWRENCE STARR, Individually and as Co-partners, Doing Business under the Firm Name of E. D. Dier & Co., and E. D. DIER & Co., Alleged Bankrupts.

Order Extending Time to File Record on Appeal.

It is hereby ordered that the time to file the Transcript of Record on Appeal in the above entitled case be extended one day from this date.

New York, April 12, 1922.

LEARNED HAND,
U. S. District Judge.

28 UNITED STATES OF AMERICA,
Southern District of New York, ss:

31368.

In the Matter of ELMORE D. DIER, HARRY J. LAWRENCE, JR., * * * E. D. DIER & Co., Alleged Bankrupts.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this twelfth day of April, in the year of our Lord one thousand nine hundred and twenty-two and of the Independence of the said United States the one hundred and forty-sixth.

[Seal of District Court of the United States, Southern District of N. Y.]

ALEX. GILCHRIST, JR.,
Clerk.

29 District Court of the United States for the Southern District of New York.

No. 31368.

In the Matter of ELMORE D. DIER, HARRY J. LAWRENCE, JR., and LAWRENCE STARR, Individually and as Co-partners, Doing Business under the Firm Name of E. D. Dier & Co., and E. D. DIER & Co., Alleged Bankrupts.

Citation for Appearance.

By the Honorable Learned Hand, Judge of the United States District Court for the Southern District of New York, to Honorable Joab H. Banton, District Attorney of the County of New York; to Manfred W. Ehrich, Trustee in Bankruptcy:

Whereas, Elmore D. Dier, Harry J. Lawrence, Jr., and Lawrence Starr, individually and as co-partners doing business under the firm name of E. D. Dier & Co., and E. D. Dier & Co., above-named, have lately appealed to the United States Supreme Court from an order made and entered herein in the District Court of the United States for the Southern District of New York, which order was made in favor of you, the said Hon. Joab H. Banton, District Attorney for the County of New York, and said alleged bankrupts have filed the security required by law,

You are hereby cited to appear before the said United States Supreme Court, to be held at the City of Washington, in the
30 District of Columbia, on the 12th day of April, next, to do and receive what may pertain to justice to be done in the premises.

Given under my hand, at the City of New York, in the Southern District of New York, in the Second Circuit, the 10th day of April in the year of our Lord, one thousand nine hundred and twenty-two.

LEARNED HAND, *D. J.*

Service of a copy of the within citation acknowledged this 11 day of April, 1922.

JOAB H. BANTON,
Per D. ROONEY, *Dist Atty.*,
MANFRED W. EHRICH,
Trustee in Bktcy.,
By L. C. BUNZL.

31 [Endorsed:] U. S. District Court, S. D. of N. Y. Filed Apr. 12, 1922.

32 [Endorsed:] U. S. District Court, Southern District of N. Y. In the Matter of Elmore D. Dier, Harry J. Lawrence, Jr., et al., Alleged Bankrupts. Transcript of Record on Appeal.

Endorsed on cover: File No. 28,829. S. New York D. C. U. S. Term No. 874. Elmore D. Dier, Harry J. Lawrence, Jr., and Lawrence Starr, &c., et al., appellants, vs. Joab H. Banton, District Attorney of the County of New York, and Manfred W. Ehrich, trustee in bankruptcy. Filed April 13th, 1922. File No. 28,829.

Supreme Court of the United States.

OCTOBER TERM, 1922.

IN THE MATTER
of
ELMORE D. DIER, HARRY J. LAWRENCE, JR., LAWRENCE STARR, individually and as co-partners doing business under the firm name of E. D. DIER & Co., and E. D. DIER & Co., Alleged Bankrupts,
Appellants.

2

Affidavit and Memorandum joining in application to advance cause for argument, but opposing stay.

3

STATE OF NEW YORK, }
County of New York, } ss.:

JOHN CALDWELL MYERS, being duly sworn, deposes and says that he resides at No. 67 West 11th Street, in the Borough of Manhattan, City, County and State of New York; that he is an attorney and counsellor at law, duly admitted to practice in this Court and in the courts of the State of New York; and that he is an assistant district attorney in the office of the District At-

4 torney of New York County and is attached to the Appeal Bureau in that office and has charge of these proceedings for and on behalf of the said District Attorney.

An appeal has been taken to this court from an order entered in the District Court of the United States for the Southern District of New York denying the application of the alleged bankrupts herein for an injunction restraining the receiver of the alleged bankrupts from delivering the books, records and documents of the said alleged bankrupts to the District Attorney of the County of New York.

5 On May 11th, 1922, the appellant served on the District Attorney of New York County notice that application would be made to this Court on Monday, May 15th, 1922, "for an order of the Court advancing said cause upon the calendar of the Court for argument at the present session of the Court, and for such other and further relief as may be just". There was served with the said notice an affidavit made by Nash Rockwood on May 11th, 1922, in support of the said application.

6 The District Attorney of New York County joins in the application to advance the cause for argument in this court, and respectfully requests the Court to grant the said application. But the said District Attorney respectfully opposes any application that may be made for an order staying or restraining him from serving a *subpoena duces tecum* requiring the production of the books, records and papers of E. D. Dier and E. D. Dier & Co. The District Attorney's reasons for opposing a further stay will be found in the following recital of the history of the proceedings to obtain injunctive relief:

On or about February 16th, 1922, Elmore D. 7
Dier, one of the alleged bankrupts herein, obtained from Hon. Learned Hand, one of the Judges of the District Court of the United States for the Southern District of New York, an order to show cause why an order should not be made enjoining and restraining the receiver of the alleged bankrupts herein from turning over to the District Attorney of the County of New York, the books, records, documents and papers of Elmore D. Dier and E. D. Dier & Co. The said order to show cause was made returnable on February 20th, 1922, and contained a clause providing that until the argument and determination of the said mo- 8
tion, the receiver was directed to retain in his possession the said books, records, documents and papers and not to part therewith until the further direction and order of the court in the premises.

On the return day of the said order to show cause, the District Attorney of New York County appeared before Judge Learned Hand and opposed the granting of the relief prayed for.

Thereafter, and on or about February 27th, 1922, Judge Learned Hand handed down an opinion refusing to grant the application for injunctive 9
relief.

After the said opinion was handed down, the said District Attorney, through one or more of his assistants, communicated several times with Nash Rockwood, Esq., of Rockwood & Lark, solicitors for the alleged bankrupts, for the purpose of agreeing upon the form and contents of an order denying the injunction which had been sought. The submission of the order to Judge Hand for signature was delayed from time to time at the

10 request of Mr. Rockwood, and none of the delay was at the request or desire of the District Attorney.

Finally, and on or about April 10th, 1922, the said order was submitted to and signed by Judge Learned Hand; and on the same day, towit, April 10th, 1922, the said judge signed an order allowing an appeal to this court from the order denying the injunction. The order allowing the appeal stayed all proceedings under the order denying the injunction for a period of thirty days, expiring May 10th, 1922. The purpose of the said stay was to give the appellants an opportunity to
11 print and file a record on appeal in this court and to make an application in this court to advance the appeal for argument.

On or about May 8th, 1922, Judge Learned Hand signed an order requiring the District Attorney to show cause on May 11th, 1922, why an order should not be made continuing the stay for a further period of thirty days. This order to show cause contained a provision that until the argument and determination of the motion, the stay theretofore granted should be continued. The order to show cause was granted on the affidavit
12 of Nash Rockwood, Esq. That affidavit contained the following allegations:

> "The appeal to the Supreme Court of the United States was promptly perfected and all of the papers relative thereto duly certified and filed with the Clerk of the Supreme Court of the United States. The bond upon appeal, $250, was duly given and said appeal was fully perfected on the 12th day of April, 1922. The deposit required by the Clerk of the said Supreme Court of the United States for the printing of the record on appeal was

duly made, and I am advised by said clerk that said record will be printed as promptly as possible, and copies furnished for use of the Court and counsel." 13

On May 10th, 1922, deponent called up the office of the Clerk of the Supreme Court of the United States over the long-distance telephone, and was informed that the deposit referred to in the affidavit of Mr. Rockwood was made on April 29th, 1922. It thus appears that the deposit was not made until 19 days after Judge Learned Hand had signed the order allowing the appeal to this court.

On May 11th, 1922, which was the return day named in the order to show cause obtained on May 8th, 1922, this deponent, acting for and in behalf of the District Attorney of New York County, appeared before Judge Learned Hand and opposed the application for the continuance of the stay. Judge Hand, after hearing argument, extended the stay up to and including May 16th, 1922, in order to give the appellants an opportunity to apply to this Court on May 15th, 1922, for the advancement of the cause for argument, and for a further stay. 14

Deponent respectfully submits that the appellants have not used due diligence in taking the necessary and proper steps for perfecting their appeal to this court and for bringing the same on for argument, and that, therefore, no further stay should be granted, but that the District Attorney of New York County should be left free to serve any proper process duly issuing out of the Courts of the State of New York requiring the production of the books, records, documents and papers of the alleged bankrupts herein, and that the receiver of the said alleged bankrupts 15

16 should be left free to obey the commands contained in such process if and when service is duly made upon him.

Deponent is informed and verily believes that the appellants, prior to the institution of the bankruptcy proceedings, were engaged in conducting what purported to be a stock brokerage business, but that in conducting the said alleged business, which was of large proportions, they did many things with and to the money and securities of their customers that were prohibited by the criminal laws of the State of New York.

Many complaints have been made to the Dis-
17 trict Attorney of New York County concerning transactions with the alleged bankrupts herein, but the District Attorney cannot properly investigate these complaints and cannot ascertain and determine whether there have been violations of the law unless and until he examines the books, records, documents and papers of the said alleged bankrupts.

Almost three months have elapsed since the institution of these proceedings. Ever since February 16th 1922, the District Attorney of New York County has been restrained by the process of the
18 District Court of the United States for the Southern District of New York from serving a *subpoena duces tecum* to compel the production of the books, records, papers and documents of the alleged bankrupts herein; and the District Attorney has thus been hampered, hindered and delayed in his efforts to ascertain whether any crime has been committed by the alleged bankrupts or any of them during the course of the business carried on by them.

Deponent respectfully submits that there is no merit in the claim of the said alleged bankrupts that they are entitled to the injunction sought and respectfully submits that the said bankrupts have pursued such dilatory tactics that they are not entitled to ask this court to grant a stay pending the hearing and determination of the appeal from the order of the District Court denying the injunction. 19

JOHN CALDWELL MYERS.

Sworn to before me this
12th day of May, 1922.
JOHN J. BUCKLEY,
Notary Public, New York County
New York County Clerk's No. 354
New York County Register's No. 4094
Commission expires March 30, 1924
[SEAL] 20

21

FILED
MAY 16 1922
WM. R. STANSBURY
CLERK

Supreme Court of the United States,

OCTOBER TERM 1921,

No. 330

In the Matter

of

Elmore D. Dier, Harry J. Lawrence, Jr. and Lawrence Starr, individually and as copartners doing business under the firm name of E. D. Dier & Co. and E. D. Dier & Co.
Bankrupts,
Appellants.

Affidavit of Saul S. Myers.

Joab H. Banton, District Attorney of New York County, and Manfred W. Ehrich, Trustee in Bankruptcy of E. D. Dier & Co.,
Appellees.

State of New York,
City and County of New York, } ss.:

Saul S. Myers, being duly sworn, deposes and says:

1. I am one of the attorneys of Manfred W. Ehrich, Esq., Trustee in Bankruptcy herein. Arthur Garfield Hays is the other attorney of the Trustee in Bankruptcy. Mr. Hays and I represent about two thousand (2,000) creditors of the estate in bankruptcy.

2. On behalf of that large body of creditors Mr. Hays and I co sent to the submission to this Court of briefs on the appeal presente by the bankrupts, *provided such briefs are submitted on or before th 22nd instant but object to any oral argument and strongly object to a stay of proceedings,* for the reason that this Court has announced th it will not hear any further oral agruments before the summer recess and the failure of the appellants to have the matter argued before th summer recess is due entirely to their dilatory tactics.

3. The appellants have allowed this matter to drag since Januar 16, 1922; on that day a petition was filed in the U. S. District Court fo the Southern District of New York for the involuntary bankruptcy o the said Elmore D. Dier et al. The appellants took no steps to prote their supposed constitutional rights until February 16, 1922; on th day they obtained from Judge Learned Hand an order requiring th Receiver in Bankruptcy—the present Trustee—to show cause why a order should not be entered enjoining him from turning over to th District Attorney of the County of New York, on subpoena, the book of the bankrupts. The matter was argued on or about February 2 1922 and was decided on or about February 27, 1922. Judge Learne Hand denied the motion. The Receiver adopted a neutral positio The appellants waited until April 10, 1922 before obtaining from Judg Hand an order denying their motion. They were perfectly content t allow the matter to drag from February 27, 1922 to April 10, 1922. An they have waited from April 10, 1922 to May 15, 1922 before makin the present application to advance.

4. The appellants would not have made the motion even at thi time except that the stay granted by Judge Learned Hand will expir on the 16th instant. I was in Court before Judge Learned Hand on th 11th instant when he announced that he would not grant any furth stay of proceedings in this matter.

5. In my opinion the order is not appealable, and I respectfull submit that this Court will, at the proper time, dismiss the appeal. N constitutional question is involved at all. The bankrupts voluntaril handed over to the Receiver in Bankruptcy the books and papers no sought by subpoena. Some of these records were handed over to m

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ersonally as the Receivers representative; other papers were to my wn knowledge handed over to the Receiver personally by the bankupts and their present attorney Nash Rockwood, Esq. At the time of urning over of such books and papers *no protest of any kind* was made y the bankrupts or their attorneys. And I submit that where bankupts voluntarily turn over their books and papers to a Receiver in Bankruptcy, no provision of the Constitution is violated if those books nd papers are afterwards used in the prosecution of the bankrupts for iolation of criminal statutes.

6. Moreover the principal bankrupt, Elmore D. Dier, has testified t great length in the bankruptcy proceeding, without claiming any onstitutional privilege at all; and he has furthermore testified from is books and records without claiming any constitutional privilege; nd I submit that any claim now made by the bankrupts that their ooks should not be used by the District Attorney, comes too late.

7. I also submit that the bankrupts will not at any rate lose any onstitutional privileges which they now have, for the reason that they an upon the trial of the action present their constitutional claims, and f they are convicted the matter can then be reviewed by this Court.

8. This is a particularly fraudulent failure; the liabilities are in xcess of $3,000,000.; the assets which have thus far come into the possession of the Receiver and Trustee are less than $100,000. The Trustee has, however, through his attorneys, been able to increase the estate o approximately $500,000. by the settlement of claims against third parties.

Mr. Hays and I have examined the bankrupt Dier, and a large number of other witnesses, and from such examinations and from independent investigations we have ascertained that the bankrupts were engaged n what is commonly known as a "bucket shop." During the three months immediately preceding bankruptcy they did not even make any pretense of buying or selling the customers' orders. During that time hey took in tremendously large sums of money from customers; some of these customers being widows and orphans, school teachers, waiters, nd even cripples. Dier testified that he did not know what he did with he $300,000. that he drew out during the twelve months immediately

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preceding bankruptcy. He testified that whenever his partner Hugh bought a diamond necklace or a string of pearls for his wife, Dier wou make a similar purchase of a diamond necklace or a string of pearls f his wife; and all of this money came from the innocent customers. N satisfactory explanation has yet been given by the bankrupts or a one else of the disappearance of nearly $3,000,000.

9. If the Court grants a stay of proceedings it will tie the han not only of the District Attorney of the County of New York, but of th United States Attorney for the Southern District of New York. An not only will the hands of those district attorneys be tied as against th bankrupts, but also against such other persons involved as Fred An drews, Bernie Andrews, Gus Stroh, and such members of the Ne York Stock Exchange as Carpender, Caffry & Co., and of the Consol dated Stock Exchange of New York as Percy Thomas, and of certa members of the New York Curb Market, who participated in these tran actions.

SAUL S. MYERS.

Sworn to before me
May 13, 1922.
JOS. G. GUERIN,
Notary Public,
New York County #501.

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